



IN THE LABOUR COURT OF SOUTH AFRICA, DURBAN

Not Reportable

Case No: D 2278/18

In the matter between:

FAZEELA ISMAIL BAYAT

Applicant

And

**MEC, DEPARTMENT OF HEALTH – KWAZULU-NATAL
PUBLIC HEALTH AND SOCIAL DEVELOPMENT**

First Respondent

SECTORAL BARGAINING COUNCIL

Second Respondent

K.M. MOODLEY

Third Respondent

Heard: 01 July 2021

Delivered: This judgment was handed down electronically by circulation to the parties and / or their legal representatives by email. The date and time for handing-down is deemed 10h00 on 04 August 2021.

Summary: Re-instatement

JUDGMENT

GOVENDER, AJ

- [1] The Applicant seeks that her non-compliance with Clause 11.2.2 and Clause 11.2.7 of the Practice Manual be condoned.
- [2] The Applicant further seeks to have her review application of the Award, handed down by the Third Respondent, on 08 September 2018, under Case No: PSJS767-17/18, be re-instated.
- [3] The First Respondent opposes the relief sought.

Background

- [4] The Applicant was employed by the First Respondent as a medical doctor based at King Edward VIII Hospital. The Applicant faced various charges of misconduct, was found guilty and dismissed. The Applicant referred an unfair dismissal to the Second Respondent and an Award under Case No: PSJS767-17/18, was handed down in favour of the First Respondent.
- [5] The Applicant then launched an application to review and set aside the said Award. It is interesting to note that the Applicant in her Notice of Motion dated 19 September 2018 did not seek reinstatement and/or back pay.

Chronological order

- [6] Below is a summary of the chronology of the events that transpired after the review application was launched, on 26 April 2018. These dates and facts have been extrapolated from the affidavits filed by the parties as well as other documents forming part of the Record.

Date	Description
11 September 2018	The Applicant's attorney received the Award and emailed a copy on 12 September 2018 to the Applicant.
25 September 2018	The Applicant only had sight of the Award on this date, after she made enquiries to her attorney. She explained that she can only access her private email address when in a Wi-Fi zone. Further the cellphone she was using had a broken touch screen and her tablet had insufficient memory in order to accommodate the amount of emails she was receiving.
27 September to 5 October 2018	The Applicant was awaiting her legal insurers, Legal Wise to assess the funds available to her under her husband's cover to proceed with her review.
24 October 2018	The Applicant consulted with her attorney and advocate. According to the Applicant, her Counsel immediately started drafting the review application. The Applicant alleges that she required additional documents such as the notes of the attorney of record Mr Ramdhani (notes pertaining to the arbitration hearing), the referral documents and medical expert reports.
21 November 2018	The appointed advocate finalised the review.
21 November to 13 December 2018	From the 21 st of November 2018 to the 13 th of December 2018 the Applicant's attorney perused the application papers and effected amendments to the review application.
14 December to 18 December 2018	From the 14 December 2018 to 18 December 2018, the Applicant raised further amendments.
18 December 2018	Review application was launched.
16 January 2019	The record and CD were received from the Registrar.
17 January 2019	The record was uplifted and sent to Sneller for transcribing. Sneller provided a quotation for the services to transcribe the record.
7 March 2019	The legal insurers paid Sneller for the transcripts. The

	attorney made enquiries about the status of the record on the 20 th , 27 th March 2018. Further enquiries on the 5 and 24 April 2019.
26 April 2019	The Applicant's attorney received the transcripts.
26 April to 16 May 2019	The Applicant was waiting confirmation from insurers regarding the remaining funds available to her.
17 May 2019	The Applicant was told that the insurance had been exhausted. She was told she needed to pay a deposit. She tried to raise funds by borrowing monies from her family members as she was unemployed.
24 July 2019	The Applicant paid half of the deposit to her attorney of record to continue with the application.
26 July 2019	Counsel was briefed to draft a supplementary affidavit.
7 August 2019 to 13 August 2019	A draft supplementary affidavit was prepared. Changes were effected to the draft by the Applicant.
20 August 2019	The Applicant consulted and effected changes to the supplementary affidavit. She noticed certain documents were missing from the Bundles which were not in possession of the Counsel.
21 August 2019	The complete bundle of documents from the attorney were supplied.
24 August 2019	Applicant requested further amendments to the supplementary affidavit.
26 August 2019	The Applicant received the affidavit, she was not satisfied with the affidavit and still effected more changes.
29 August 2019	The Applicant effected further changes to the affidavit.
2 September 2019	The Applicant effected changes to the affidavit.
4 September 2019	The Applicant effected changes to the affidavit.
12 September 2019	The Applicant was satisfied with the affidavit. She arranged to attend on the offices of her attorney to sign the affidavit.
25 September 2019	The Applicant attends to collect the transcripts and the affidavit. She alleges that she was unable to sign the affidavit on the 25 September 2019 as she was required to

	make copies of the transcripts.
27 September 2019	The Applicant signs the supplementary affidavit and the same is served.

- [7] To date the review pleadings have not closed as the Applicant's replying affidavit has not been filed.
- [8] The Applicant's attorney of record, Ms Ramdhani submitted in address that the replying affidavit was not filed, because of the point *in limine* raised by the First Respondent in their answering affidavit i.e. of non-compliance with Clause 11.2.2 of the Practice Manual.
- [9] The Applicant was in possession of the transcribed record since 26 April 2019. However the transcribed record was only filed on the 27 of September 2018.

Condonation for the late filing of the record

- [10] The Applicant has failed to comply with the provisions of Clause 11.2.2³ of the Labour Court Practice Manual , by failing to file the record of the proceedings within 60 days and the Applicant was thus in terms of Clause 11.2.3⁴ deemed to have withdrawn the application.
- [11] It is trite, that if the time periods provided for in terms of Clauses 11.2.2 and 11.2.7 cannot be complied with, *good cause* must be shown to revive the review application⁵.
- [12] The operative effect of a review which has lapsed in terms of Clause 11.2.7 of the Practice Manual, is that it is no longer properly before this Court and the Court lacks the requisite jurisdiction to determine the review

³ For the purposes of Rule 7A(6), records must be filed within 60 days of the date in which the Applicant is advised by the Registrar that the record has been received.

⁴ If the Applicant failed to file a record within the prescribed period, the Applicant will be deemed to have withdrawn the application, unless ...

⁵ *Samuels v Old Mutual Bank* (2017) 38 ILJ 1790 (LAC) at para 14

application unless good cause has been shown and the matter is reinstated by an order of this Court.

- [13] In the case of **SA Post Office Ltd v CCMA**⁶, Waglay DJP (as he was then) stated that:-

'In my view, each condonation application must be decided on its own facts bearing in mind the general criteria. While the rules are there to be applied, they are not inflexible but the flexibility is directly linked to and apportioned in accordance with the interests of justice; prejudice; prospects of success; and finally, degree of delay and the explanation thereof. The issue of delay must be viewed in relation to the expedition with which the law expects the principal matter to be resolved.'

- [14] 'Good cause' was explained in **Melane v Santam Insurance Co. Ltd**⁷ in the following terms;

'In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects may tend to compensate for a long delay. And the Respondent's interests in finality must not be overlooked'

⁶ [2012] 1 BLLR 30 (LAC) at para 23.

⁷ 1962 (4) SA 531 (A) At 532b-E.

Evaluation and analysis

Duration of the Delay

- [15] The Applicant received the from the Registrar office on 16 January 2019. The transcribed record ought to have been filed by 16 April 2019, excluding public holidays and weekends. The transcribed record was only filed on the 27 September 2019, approximately some 5 (five) months later.

Explanation for the delay

- [16] The Applicant contends that the record could not be filed within the stipulated 60 day period, due to her financial constraints. She was unemployed. There were delays in the insurers assessing funds available to her after they had paid for the transcripts. There were further delays encountered when the insurers told her that the funds were exhausted. She had to then raise loans from family in order to pay the deposit to her attorneys to commence with the litigation. This deposit was paid on 24 July 2019.
- [17] The Applicant's explanation for the delays is stated in very broad terms and is definitely lacking in details. She fails the state when she enquired from Legal Wise about her available funds. On a reading of the papers, it appears that the last payment from Legal Wise was for the transcripts on the 07 March 2019. Therefore, the Applicant or her attorney had since then to establish the further available funds. The Applicant merely alleges that when the transcribed record was received, then enquiries made about the available funds. However there is no details to explain why the Applicant had to wait for the transcribed Record to make these enquiries at a stage in the proceedings when the Applicant was already out of time to find the record. This enquiry resulted in a delay from 26 April 2019 to 17 May 2019.

- [18] There is another significant delay from 17 May 2019 to 24 July 2019, when the Applicant broadly alleges that she had to borrow monies from family members. The Applicant fails to provide any specifics about these “loans” that she obtained or when she obtained them. Again another vague statement. However, what is perplexing is that the Applicant had access to a monthly pension. She was not a litigant with no access to funds at all. The Applicant admits that the sum of approximately R5.3 million was transferred to a preservation fund for her benefit, so I find it highly improbable that she no means to raise monies to fund her litigation.
- [19] Clearly the Applicant has not taken the court into her confidence and has been economical with the details of the facts that she relies upon. In order to demonstrate good cause, the Applicant ought to provide as detailed an explanation as possible, in relation to the delay, in order to persuade a court to find in her favour. She fails to provide details of how much she receives from her monthly pension. She merely states it is one fifth of her income. She fails to disclose the other streams of income in her home but merely alleges she was the main (not sole) bread winner prior to her dismissal.
- [20] She alleges that she is unable to secure work in the private sector due to the fact she was dismissed. Her dismissal did not pertain to any dishonesty and she was member in good standing with the HPCSA. I find it highly improbable, that a qualified medical doctor would not be able to secure employment, temporary or otherwise in the private sector, due solely to the fact that she was dismissed.
- [21] Most perplexing, is that the Applicant was in possession of the transcribed record since 26 April 2019, however it was only filed approximately 5 (five) months later with no explanation for this delay. Ms Ramdhani who appeared for the Applicant, when questioned by the Court, submitted that the transcribed Record could not have been filed earlier than 27

September 2019, due to a lack of funds. Ms Ramdhani further also submitted to the Court, that the transcribed Record could not be filed any earlier, as the Applicant could not afford to photocopy the transcribed Record which was about 333 pages and fitted in one lever arch file. I reject this contention as highly improbable.

[22] It is noteworthy to mention that the Applicant's attorney was paid a deposit on 24 July 2019 and this begs the question as to why when the attorney was placed in funds, she did not photocopy and file the transcribed Record into court. This compliance with the Rules would have incurred a minimal of costs. Surely, if the attorneys of record were placed in funds then the prerogative would have been to ensure compliance with the Rules of the Labour Court. However, there is no explanation for this omission on the part of the Applicant from the papers before me. Most astonishing is that the Record was transcribed a mere week out of time. The delay of 5 (five) months could have been avoided entirely with due diligence and attentiveness.

[23] The Applicant also further alleges that from 7 August 2019, when her Counsel began preparing the supplementary affidavit, that the affidavit could not be finalised any sooner than 12 September 2019, due to the many changes that she wished to effect to the affidavit. I pause to mention that the changes that the Applicant effected began on 20 August 2019 and she continued making changes on 24 August, 26 August, 29 August, 02 September, 04 September and finally she was satisfied with the affidavit on 12 September 2019. Further, the supplementary affidavit was filed out of time with no condonation sought.

[24] The Applicant could have sought an extension from the First Respondent herein to file the transcribed Record out of time. The Applicant could further have approached a Judge in chambers on motion for an extension if consent was refused by the Respondent. However, none of these avenues were explored by the Applicant.

- [25] The Applicant's tardiness in prosecuting this review is shocking. On a conspectus of all the facts, in my view, there has been a flagrant disregard for the Rules. The explanation offered by the Applicant is clearly inexcusable and not satisfactory. Even if the Applicant delayed with the filing of the supplementary affidavit, or was not satisfied with her supplementary affidavit, this did not bar the Applicant from filing the completed transcribed Record in Court and complying with Clause 11.2.3 as far back as April 2019.

Prospects of success

- [26] The Applicant alleges that she enjoys excellent prospects of success on review.
- [27] The Applicant faced various counts of misconduct varying from Charge A to Charge J. Some of the charges pertained to Applicant disobeying the security officers at the gates and displaying disrespect, abusive behaviour towards security officers and other staff. Further charges pertained to the Applicant's improper, disgraceful and unacceptable conduct in failing to attend to emergency calls in Room 6. Further allegations were that she failed to respond to calls and SMS's sent to her by her supervisor Dr Green-Thomas requesting her to assist in Room 6 at King Edward VIII Hospital. Further charges pertain to allegations that she disrespected her supervisors when she was called upon to render assistance. Further charges alleged that she repeatedly reported late for clinical duties contravening the Code of Conduct and failed to do her ward rounds.
- [28] The Applicant alleges that the Arbitrator had committed gross irregularity when he failed to consider her version of the events even though she had provided plausible explanations for each charge and maintained her version under cross-examination. She further alleges that the Third Respondent incorrectly stated facts in his Award thereby committing gross irregularities. She alleges that the Third Respondent incorrectly found that

she had pushed the red tape aside and entered the parking area and that this finding was factually incorrect.

[29] Further, that the Third Respondent was biased in that he made a finding that she drove at an excessive speed in the parking lot which was impossible to do given the bends and curves in the said parking lot. Further, that the Third Respondent erred when relied upon the evidence of the First Respondent's witnesses Khumalo and Ndlela despite the obvious and clear contradictions in their evidence. Further, the Third Respondent found incorrectly in paragraph 70 of his Award that the mention of politicians was an oblique reference to the MEC who was attending the event at the hospital.

[30] Further, the Third Respondent committed gross irregularity when he failed to take into account that under cross-examination Dr Green-Thomas admitted that there were no emergencies on 21 June 2016 in Room 6. Further, the Third Respondent failed to consider that these two screenshots relied upon by the First Respondent were from Dr Green-Thomas to and from numbers that were not her number.

[31] She alleges that the Third Respondent failed to consider that Dr Green-Thomas had four numbers which he had stored for her on his phone and that two of those numbers did not work for her. Further, the Third Respondent failed to consider that charges H and I relate to incidents that took place in May and June 2016 and that she was on leave for May 2016 and therefore the charges against her were fabricated.

[32] The First Respondent on the other hand, alleges that the Applicant has poor prospects of success on review and further that she had even tendered an apology to the security guards which was part of the indexed bundle at page 313, wherein she apologised for her behaviour which was the basis of one of the charges against her. Further, that she failed to promote unity and well-being of patients and staff in wards of the hospital

by showing anger to patients and nursing staff during working hours contravening the Code of Conduct.

[33] In **Colett v CCMA & Others**,⁸ the LAC held that there are overwhelming precedents in this Court, the Supreme Court of Appeal and the Constitutional Court for the proposition that where there is a flagrant or gross failure to comply with the Rules of Court, condonation may be refused without considering the prospects of success.

[34] In **NUM v Council for Mineral Technology**⁹, it was held:

“The submission that the court a quo had to consider the prospects of success irrespective of the unsatisfactory and unacceptable explanation for the gross in flagrant disregard of the rules was without merit.”

[35] Since my finding is that the conduct of the Applicant is inexcusable and the explanation is so unsatisfactory, in that she has displayed a flagrant disregard for the Rules of Court and that many of the delays could have been avoided, therefore in my considered view there is no need to consider the prospects of success. However, even on a generous consideration thereof, I am not convinced that the prospects are so strong to persuade me otherwise.

Conclusion

[36] It is trite that the corner stone of the Labour Relations Act and the Practice Rules is to ensure an expeditious and speedy resolution of labour disputes. The First Respondent is entitled to ensure and has a right to have the matter finally disposed of and I find herein that the weight is tipped in favour of the First Respondent in this regard.

⁸ (2014) 18 ILJ 367 (LAC).

⁹ (1999) 3 BLLR 209 (LAC) at paragraph 10.

- [37] The application for condonation for non-compliance with clauses 11.2.2 and 11.2.7 is not granted.
- [38] Accordingly, the application for reinstatement is also not granted.

Costs

- [39] In the granting of costs, I must have reference to the principles of fairness. I do not find that it would be fair for the Applicant to be burdened with a costs order herein. The Applicant was legally assisted throughout these proceedings. She is reliant on her legal team when it comes to the intricacies of prosecuting a review application and adherence to the Rules of the Labour Court and the Practice Manual.
- [40] Whilst I acknowledge that the Applicant also delayed in placing her attorney in funds, it cannot be ignored that the transcribed Record could nonetheless have been filed as soon as received.
- [41] There was no reasons advanced as to why the transcribed Record was not filed in the Court, despite being placed in funds of a deposit, and despite being in possession of the transcribed Record for over 5 (five) months. Further, on a careful perusal of all the papers before me in the court file, I also find that there were no cogent reasons advanced as to why the handwritten notes of Ms Ramdhani and expert medical reports were needed to draft the review. This unduly delayed the filing of the review application as well.
- [42] My *prima facie* view is that the delay was one that was avoidable had due diligence been exercised by the Applicant and her attorney. However, since Ms Ramdhani has not had an opportunity to respond to this *prima facie* view, it will not be fair to Ms Ramdhani to make any findings as to who should pay the costs between her and the Applicant.

Order

- a) The application for condonation for non-compliance with clauses 11.2.2. and 11.2.7 is hereby dismissed.
- b) The application for reinstatement of the review is hereby dismissed.
- c) No order as to costs.

N Govender

Acting Judge of the Labour Court of South Africa

APPEARANCES:

APPLICANT: Ms P Ramdhani Pratica Ramdhani Inc

RESPONDENT: Advocate Qono – Reddy Instructed by State Attorney, Durban